SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-260

CARMINE TRAMUNTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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The Government has relied upon *United States* v. *Kahan*, 415 U.S. 239 as authority for its argument that the Fifth Amendment does not prohibit the use of false or evasive testimony, compelled under a grant of immunity, at a subsequent criminal trial (Govt. Br. pp. 3-4). The Government, however, misconstrues the holding in *Kahan*, as no Fifth Amendment issue was present in that case.

The statements in *Kahan* were not compelled, in a Fifth Amendment sense, as they were not the product of duress, coercion, an order to testify or the like. They were volun-

tarily made to secure appointment of counsel at government expense. The question in *Kahan* was whether non-compelled false statements should be excluded because they were made in order to assert a Sixth Amendment right.

The only basis for excluding voluntary admissions of a defendant is that contained in *Simmons* v. *United States*, 390 U.S. 377 (1968). The Court in *Simmons* held that there is no Fifth Amendment violation where testimony is voluntarily given to secure a benefit. 390 U.S. at 393-394 (Compare dissenting opinion of Mr. Justice Black, 390 U.S. at 397-398). Nonetheless, the Court went on to hold that even though testimony is not involuntary in Fifth Amendment terms, a defendant should not be forced to assert his Fourth Amendment Rights only at the risk of losing his rights under the Fifth Amendment. Such a Hobson's choice could not be deemed to constitute a Fifth Amendment waiver. See also *Fay* v. *Noia*, 372 U.S. 391, 439-440 (1963).

The *Simmons* reasoning was subsequently rejected in *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970). The Court in *McGautha* v. *California*, 402 U.S. 183, 212 (1971), has also stated that "the validity of [the Simmons] reasoning must now be regarded as open to question . . .".

The *Kahan* decision is a further refusal to extend the *Simmons* reasoning beyond the confines of that case, as well as a reiteration of the *Shotwell* principle that one making a voluntary disclosure to secure a benefit has no complaint when that non-compelled disclosure is later used to incriminate him. There is nothing in *Kahan* to support the Government's contention that compelled disclosures—from one who has asserted a valid Fifth Amendment claim of privilege and who has been forced to testify by court

order at the pain of contempt—may be used against the person so compelled without violating the grant of immunity and the Fifth Amendment.

The importance and substantiality of the questions here presented have not been denied. The only claim is that the decisions in *Kahan, Glickstein* v. *United States,* 222 U.S. 139 and *Bryan* v. *United States,* 339 U.S. 323, have already settled the issues. We believe that none of these cases is apposite; that the issue is one never before determined by the Court; and that its immediate resolution is necessary, since the decision below not only grafts a new exception upon a use-immunity statute not provided for by Congress, but it substantially diminishes the Fifth Amendment safeguards set down by this Court in *Kastigat* v. *United States,* 406 U.S. 441.

Respectfully submitted,

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Dated: New York City, New York
December 10th, 1974